Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

FRANCOIS SACULLA, M.D.,

Petitioner,

v.

WISCONSIN MEDICAL EXAMINING BOARD & WISCONSIN DEPARTMENT OF REGULATION & LICENSING,

Respondents.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's reasoning in *Carrie Jaffee, Special Administrator for Ricky Allen, Sr., Deceased v. Mary Lu Redmond, et al.*, 518 U.S. ___, 135 L.Ed.2d 337, 116 S. Ct. ___ (1996), should this Court now resolve the issue of whether a state can legally invade the psychotherapist-patient privilege in a public disciplinary hearing against a psychiatrist when the psychiatric patient whose treatment is made public by the proceeding recants her allegations against the psychiatrist and objects to the proceeding?

2. Should this Court resolve the issue of whether a state can use adverse inferences based upon a psychiatrist's refusal to testify to meet its burden of proof in a disciplinary action when the refusal to testify is based upon psychotherapist-patient and Fifth Amendment privileges?

LIST OF PARTIES

The Petitioner is Francois Saculla, M.D.

The Respondents are the State of Wisconsin Medical Examining Board and the State of Wisconsin Department of Regulation & Licensing.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Francois Saculla, M.D., respectfully requests that a writ of certiorari issue to review this opinion and judgment of the Wisconsin Supreme Court entered in the proceeding below on November 20, 1996.

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals is unreported and is reprinted in the Appendix commencing at page App. 1.

The decision of the Wisconsin Supreme Court denying review is reprinted in the Appendix commencing at page App. 22.

The opinion of the Wisconsin Trial Court is unreported and is reprinted in the Appendix commencing at page App. 23.

The opinion of the Wisconsin Medical Examining Board is reprinted in the Appendix commencing at page App. 52.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257; the judgment of the Wisconsin Court of Appeals (App. 1a) was entered on September 18, 1996; petitioner's timely petition to the Wisconsin Supreme Court was denied on November 20, 1996 (App. 22)

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment of the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 905.04 Wisconsin Statutes: Physician-patient, registered nurse-patient, chiropractor-patient or psychologist-patient privilege provides in relevant part:

(2) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

The entirety of Sec. 905.04 Wis. Stats. is reprinted in the Appendix commencing at page App. 60.

Section 940.22 Wisconsin Statutes: Sexual exploitation by therapist; duty to report provides in relevant part:

2. SEXUAL CONTACT PROHIBITED. Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class D felony. Consent is not an issue in an action under this subsection.

The entirety of Sec. 940.22 Wis. Stats. is reprinted in the appendix commencing at page App. 65.

Section 939.74 Wisconsin Statutes: Time Limitations on Prosecutions provides in relevant part:

(1) Except as provided in sub. (2), and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced

when a warrant or summons is issued, an indictment is found, or an information is filed.

The entirety of Sec. 939.74 is reprinted in the appendix commencing at page App. 70.

Section 15.08 Wisconsin Statutes: Examining Boards and Councils provides in relevant part:

(4) QUORUM. (a) A majority of the membership of an examining board constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the examining board.

(b) Notwithstanding par. (a), no certificate or license which entitles the person certified or licensed to practice a trade or profession shall be suspended or revoked without the affirmative vote of two-thirds of the membership of the examining board.

The entirety of Section 15.08 Wis. Stats. is reprinted in the appendix commencing at page App. 72.

STATEMENT OF THE CASE

The Petitioner, Dr. Francois Saculla, is a physician licensed by the State of Wisconsin since 1967. During his many years of practice he specialized in the area of psychiatry, had no medical malpractice complaints filed against him and no complaints of inappropriate sexual conduct with any patient until a licensing action was commenced by the State of Wisconsin Medical Examining Board in March, 1993.

The action commenced by the State of Wisconsin in 1993 against Dr. Saculla arose out of his psychiatric treatment of a patient in late 1989 who had a history of severe mental illness including delusions, paranoia and violent assaultive behavior.

In mid-March 1990, a young woman with a long history of severe mental illness sent a one page letter to a hospital administrator complaining that she had an affair with Dr. Saculla. This letter was referred to the Wisconsin Medical Examining Board and the Racine County District Attorney on March 16, 1990 despite the fact that during this same period the patient was readmitted to the hospital on a three party mental commitment due to her severe psychiatric problems consisting of delusions, paranoia and violent assaultive behavior.

Three years later, on March 10, 1993, the State of Wisconsin Medical Examining Board issued a complaint against Dr. Saculla alleging that "on three separate occasions between November 28, 1989 and Christmas of 1989 Dr. Saculla had engaged in sexual conduct with a patient by allowing her to perform oral sex on him."

This complaint was issued despite the fact that the patient was no longer a complainant and objected to the complaint. The week before the complaint was issued, the patient went to the office of the State's prosecuting attorney and emotionally pleaded with him to drop the case against Dr. Saculla. This meeting was followed by the patient's handwritten memo to the State's prosecuting attorney dated March 5, 1993 advising him that "Whether you agree or not, I am not going to continue with this matter" and her telephone call to the State's Attorney

advising him again of her decision not to proceed with the case against Dr. Saculla.

After the complaint was issued, the patient was contacted and met with a private investigator licensed by the State of Wisconsin who had been retained on behalf of Dr. Saculla. On that date, the patient voluntarily explained that she was not a complainant against Dr. Saculla and that because of her mental and emotional state she was not certain that any sexual activity had ever occurred with Dr. Saculla. After discussing this matter with the investigator, the patient gave the following hand-written sworn statement:

> **1. I do not wish to pursue a complaint against Dr. Saculla.**
>
> **2. I told Mr. Zwieg that I did not want to pursue the matter officially about a month ago.**
>
> **3. Due to my emotional state at the time I would be an unreliable witness at this time.**
>
> **4. Due to my emotional state at the time I can not state positively that any sexual incident ever occurred between Dr. Saculla and myself.**

Pre-hearing attempts to have the complaint dismissed were denied despite the fact that the patient never retracted her sworn statement prior to the hearing.

At the commencement of the public disciplinary hearing against him, the state called Dr. Saculla adversely as its first witness. At that time he was handed a written release signed by his former patient which authorized him to discuss her treatment but did not allow him to publicly testify. On advice of counsel, Dr. Saculla refused to testify citing his ethical duty to remain silent under the

Hippocratic Oath and the physician patient privilege set forth in Sec. 905.04 Wis. Stats.

After the state overruled his objections, Dr. Saculla invoked the Fifth Amendment privilege based upon the fact that Sec. 940.22 Wis. Stats. made the allegation a felony and Wisconsin's six year statute of limitations under Sec. 939.74 Wis. Stats. had not yet expired. Dr. Saculla agreed to waive all privileges if his former patient appeared as a complainant witness at the hearing but the state refused to accept this waiver.

Dr. Saculla's former patient did not voluntarily appear at the hearing. She was subpoenaed by the State and to ensure her arrival a State employee drove her from Milwaukee to the hearing site in Madison, Wisconsin. Prior to her testimony, the patient again stated she was not a complainant in the matter. The State's attorney still proceeded and questioned her regarding her extensive psychiatric condition and her treatment records were entered as exhibits. In conflict with her previous sworn statement, the patient now testified that she had performed oral sex on Dr. Saculla on one occasion but could give no specific date.

To disprove the patient's subpoenaed testimony, Dr. Saculla called eighteen witnesses who testified about their observations of the patient's behavior and her false accusations and charges against various people. Witnesses included police officers from three jurisdictions, a family member, neighbors and co-workers, all of whom substantiated her severe psychotic illness, consisting of delusions and assaultive behavior. Of particular significance was her accusation that police officers had "raped

her" one month following her original allegation against Dr. Saculla.

Noting the problems in the patient's testimony and the evidence regarding her severe psychiatric problems and credibility, the State drew on two adverse inferences arising from Dr. Saculla's refusal to testify to meet the State's required preponderance of the evidence burden of proof. Unable to obtain the mandated two-third's vote of its membership to revoke Dr. Saculla's license as required by Section 15.08(4) Wis. Stats., on the vote of only a minority of its full membership, the State Medical Examining Board upheld the adverse inferences to support the burden of proof but changed the penalty by suspending Dr. Saculla's license to half the population (all women) and imposing other severe restrictions on his license to practice medicine.

Petitioner's appeal to the Circuit Court for Racine County was denied on April 14, 1995 and his appeal to the Wisconsin Court of Appeals, District II was denied on September 18, 1996. Petitioner's request for review by the Wisconsin Supreme Court was denied on November 20, 1996.

REASONS FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE DECISION BELOW IS THE OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO RESOLVE IN LIGHT OF THIS COURT'S REASONING IN *CARRIE JAFFE, SPECIAL ADMINISTRATOR FOR RICKY ALLEN, SR., DECEASED V. MARY LU REDMOND et al.*, 518 U.S. ___, 135 L.ED.2D 337, 116 S. CT. ___ (1996) THE ISSUE OF WHETHER OR NOT A STATE CAN LEGALLY INVADE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN A PUBLIC DISCIPLINARY PROCEEDING AGAINST A PSYCHIATRIST, WHEN THE PSYCHIATRIC PATIENT WHO IS NOT A COMPLAINANT AND WHOSE MEDICAL CONDITION AND RECORDS ARE MADE PUBLIC DURING THE PROCEEDING, RECANTS HER ALLEGATIONS AGAINST THE PSYCHIATRIST AND OBJECTS TO THE PROCEEDING.

The Wisconsin courts have erred in holding that the Wisconsin Medical Examining Board and the Wisconsin Department of Regulation and Licensing had the proper authority to issue a complaint and to hold a public hearing after the psychiatric patient, whose mental condition and treatment records were publicly disclosed to the world during that hearing, recanted her previous allegations against the psychiatrist and objected to the proceeding being held. This holding is in conflict with the moral and ethical obligations of psychiatrists to uphold their patient's right to confidentiality and with this Court's reasoning in *Carrie Jaffe, Special Administrator for Ricky Allen, Sr., Deceased v. Mary Lu Redmond, et al.*, 518 U.S. ___, 135 L.Ed.2d 337, 116 S. Ct. ___ (1996). The Wisconsin decision puts all future psychiatrists who are accused of misconduct in the practice of medicine in the unfortunate

position of having to choose between protecting their patient's right to confidentiality or publicly disclosing their patient's private psychiatric condition and treatment to successfully defend themselves against allegations not supported by their patients.

In Wisconsin the physician patient privilege is codified at Sec. 905.04 Wis. Stats. and mandates that a physician is not at liberty to discuss his patient's conditions absent one of the listed exceptions. Despite having no listed exception to the privilege for disciplinary actions by the State, the court of appeals erroneously held that because the patient had signed an authorization giving her medical records to State employees and authorizing Dr. Saculla to discuss her condition with them, she had also consented to the public hearing, the public disclosure of her psychiatric condition and treatment, and Dr. Saculla's public testimony about her psychiatric condition. App. 12-13.

In reaching this decision, the court of appeals ignored this Court's reasoning in *Jaffe* regarding the paramount importance of the psychotherapy privilege. Recognizing the absolute need for confidentiality and trust in psychotherapy during which patients are willing to make frank and complete disclosure of facts, emotions, memories and fears, and recognizing the sensitive nature of the problems for which individuals consult psychotherapists, this Court recognized an absolute federal psychotherapist patient privilege. In so doing, this Court agreed that "a psychotherapist-patient privilege will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth' *Trammel*, 445 U.S. at 50, 63 L.Ed.2d 186, 100 S. Ct. 906." *Id.* at 348.

The absolute psychotherapist-patient privilege mandated by this Court and the important public and private interests which it fosters are extinguished at the state level when States are allowed to proceed with public disciplinary actions against psychotherapists over the objections of non-complainant patients whose psychiatric conditions are made public by the proceeding. The Wisconsin courts have erred by ignoring the psychotherapy privilege and penalizing Dr. Saculla for recognizing his patient's absolute right to confidentiality. Psychotherapists should not have to choose between their patients' right to confidentiality and their need to defend themselves and protect the means by which they are able to earn a livelihood, in public disciplinary hearings brought by the state over the objections of the patient. No psychotherapist should be placed in such an untenable position and no patient should have to fear that someday their private psychiatric treatment and condition may become public during a disciplinary action in which they are not a complainant.

II. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE DECISION BELOW IS AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO DECIDE WHETHER OR NOT A STATE CAN USE ADVERSE INFERENCES BASED UPON A PSYCHIATRIST'S REFUSAL TO TESTIFY TO MEET ITS BURDEN OF PROOF IN A DISCIPLINARY ACTION WHEN THE REFUSAL TO TESTIFY IS BASED UPON PHYSICIAN-PATIENT AND FIFTH AMENDMENT PRIVILEGES.

Dr. Saculla's refusal to testify was based upon two privileges: the psychotherapist patient privilege and the Fifth Amendment privilege. The Wisconsin Court of Appeals erred by ignoring this Court's reasoning in *Jaffe*, ignoring Dr. Saculla's psychotherapist patient privilege and refusing to recognize Dr. Saculla's Fifth Amendment right.

The Fifth Amendment guarantees to each citizen the right to remain silent and to suffer no penalty for such silence. In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) the Supreme Court of the United States held that the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.

Because the six year statute of limitations for felonies set forth in Sec. 939.74 Wis. Stats. had not yet run, and because Sec. 940.22 Wis. Stats. made it a felony for a physician to have sex with a patient, Dr. Saculla had a Constitutional right to remain silent without being

penalized by adverse inferences taken from his silence. The Wisconsin Courts erred by refusing to recognize this privilege and stating that

> "Since the administrative disciplinary hearing was a civil proceeding and not a criminal proceeding, see *State v. Preston*, 38 Wis. 2d 582, 588c, 159 N.W.2d 684, 685 (per curiam addendum to original case), cert. denied, 393 U.S. 981 (1968) the rules of criminal procedure are inapplicable. Moreover, the supreme court has held 'that an inference of guilt or against interest of the witness may be drawn as a matter of law from the invocation of the fifth amendment in a civil suit. The inference which may be drawn depends upon the question asked and the weight to be given the inference depends upon the facts.' *State v. Postorino*, 53 Wis. 2d 412, 417, 193 N.W.2d 1, 3 (1972) (quoting *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 172 N.W.2d 812, 815 (1969). Therefore, we must accept the findings of the Board, which include the adverse inferences taken from Saculla's refusal to respond to virtually all of the questions posed to him by the complainant's attorney. See Id." App. 11.

In *Wehling v. Columbia Broadcasting System*, 611 F.2d 1026 (5th Circuit 1979), the court held that the raising of the Fifth Amendment in a civil action did not deprive the party of its protection when their existed a potential for criminal prosecution. The court ruled that when these circumstances are present the party asserting his or her Fifth Amendment privilege should not be penalized for doing so. In addition, in *Spevack v. Klein*, 385 U.S. 511 (1967) the Supreme Court of the United States examined

this issue in a disciplinary hearing involving an attorney. The Court held that the Fifth Amendment having been absorbed in the Fourteenth Amendment extended its protection to lawyers as well as other individuals and it should not be watered down by imposing the dishonor of disbarment and the deprivation of livelihood as a price for asserting it. Moreover, in *Spevack,* the Court noted that "penalty" is not restricted to fine or imprisonment but also applies to the imposition of any sanction which makes the assertion of the Fifth Amendment privilege "costly."

Federal law is clear that there should be no penalty for asserting one's Fifth Amendment right to remain silent when there exists the threat of criminal prosecution. Courts in Wisconsin, however, have mandated the imposition of costly penalties by allowing adverse inferences to be taken when an individual asserts his or her Fifth Amendment right despite the potential for criminal prosecution so that the state can satisfy its burden of proof in civil actions. In so doing, Wisconsin courts have wrongfully allowed a fundamental constitutional right to be stripped away from the citizens who live in Wisconsin.

A writ of certiorari is necessary to resolve the important questions of whether a state has the power to invade the absolute psychotherapist-patient privilege and whether a state can use adverse inferences to satisfy its burden of proof when a psychiatrist refuses to testify on the basis of the psychotherapist-patient and Fifth Amendment privileges. A writ of certiorari is this Court's opportunity to further define the contours of the absolute psychotherapist-patient privilege recognized by this Court in *Carrie Jaffe Special Administrator for Ricky Allen, Sr., Deceased v. Mary Lu Redmond et al.*, 518 U.S. ___, 135 L.Ed.2d 337, 116 S. Ct. ___ (1996).

CONCLUSION

A petition for writ of certiorari should be granted.

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1489

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FRANCOIS J. SACULLA, M.D.,

Petitioner-Appellant,

v.

STATE OF WISCONSIN MEDICAL EXAMINING BOARD AND DEPARTMENT OF REGULATION AND LICENSING,

Respondents-Respondents.

APPEAL from an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed.*

Before ANDERSON, P.J., NETTESHEIM and SNYDER, JJ.

ANDERSON, P.J. Dr. Francois J. Saculla appeals from an order affirming the State of Wisconsin Medical Examining Board's (the Board) limitation of his license based upon the Board's finding that Saculla engaged in unprofessional conduct in violation of § 448.02(3), STATS., and WIS. ADM. CODE§ MED. 10.02(2)(h), by having sexual contact with a patient. Saculla raises numerous issues on appeal relating to the sufficiency of the evidence, credibility determinations and his refusal to testify. Saculla further contends that he was deprived of due process during the disciplinary proceedings. We conclude that each of Saculla's contentions lacks merit. Accordingly, we affirm the trial court's order.

Saculla is licensed and registered to practice medicine and surgery in the state of Wisconsin, specializing in psychiatry. Saculla was employed as a psychiatrist at the Milwaukee County Mental Health Center (MCMHC) in Milwaukee, Wisconsin, from March 1989 through January 15, 1990.

The complainant, Kathy, was admitted to MCMHC for psychiatric problems twice in 1989. During both inpatient psychiatric hospitalizations, Kathy was under the professional care of Saculla. After Kathy's second discharge, Saculla prescribed a continuing care plan on an outpatient basis at MCMHC. Saculla, in his professional capacity, saw Kathy on an outpatient basis on December 5, 1989, and January 3, 1990.

Saculla also had several conversations with Kathy's mother, Mary, about Kathy's infatuation with him and Kathy's numerous telephone calls to his home. Mary and Saculla discussed the "transference" which often occurs

with psychiatric patients and their doctors. Despite his concerns, Saculla never noted or reported Kathy's infatuation in her medical records at MCMHC.

Also omitted from Kathy's medical records are three visits she made to Saculla's residence in Racine between Thanksgiving and Christmas of 1989. The initial visit occurred on a Saturday afternoon. Saculla took Kathy to visit with a patient, and then "pick[ed] up some food and went back to his home."

On Kathy's second visit, she brought Saculla a VCR. In exchange he gave her a ski sweater. Kathy hooked up the VCR in his bedroom and the two watched a portion of one of Saculla's professional tapes to make sure the VCR was working properly. Kathy testified that during this visit she performed oral sex upon Saculla in his bedroom.

Kathy visited a third time to complete a disability application which Saculla was assisting her with. Kathy stayed several minutes and then left.

In March 1990, Kathy filed a letter of complaint against Saculla with Dr. L. Ronald Cromwell, associate medical director at MCMHC. After investigating the complaint, Cromwell referred the matter to the Board.

On September 17, 1990, Saculla was interviewed by Pam Ellefson, a state medical investigator. In the interview, Saculla denied any physical or sexual contact between him and Kathy. However, he provided additional details of the three visits from Kathy at his home.

As part of a separate investigation of the matter, Saculla and Betty Hass, a friend of Saculla, met with Attorney John Zwieg, who represented the Department of

Regulation and Licensing (the Department), and his investigator, Dale S. Nash, in early 1993. During the interview, Saculla stated that he wanted Kathy deposed to see if she could describe his genitalia. He also described Kathy as "delusional, paranoid, disordered and want[ing] to get attached to an individual of higher status than she." Saculla admitted that Kathy was in his home on three occasions; that she made multiple calls to his home, once saying she loved him; and that he returned calls to Kathy at her home.

On March 10, 1993, the Department issued a complaint against Saculla on behalf of the Board. The complaint alleged that on three separate occasions between November 28, 1989, and Christmas of 1989, Saculla and Kathy "engaged in sexual conduct, including [Kathy] performing oral sex on [Saculla]." The complaint further alleged that by entering into a sexual relationship with a patient, Saculla's behavior constituted unprofessional conduct as defined by § 448.02(3), STATS., and WIS. ADM. CODE § 10.02(2)(h), as such conduct is dangerous to the patient. Saculla denied the allegations.

An eight-day hearing was held between November 15, 1993, and January 7, 1994, before an administrative law judge (ALJ). In August 1994, the ALJ issued a decision which addressed the major areas of Kathy's and Saculla's conduct as was presented in the case. The ALJ concluded that "it is more likely than not that Dr. Saculla engaged in sexual activity with his patient, Kathy." The ALJ recommended to the Board that Saculla's license be revoked.

After oral arguments and based upon a review of the record, the Board adopted the proposed findings of fact and conclusions of law of the ALJ in their entirety. The Board was unable to adopt the ALJ's recommendation to revoke Saculla's license because the requisite two-thirds of the Board's membership was not present. *See* § 15.08(4)(a) and (b), STATS. Instead, the Board fashioned a lesser punishment which fulfilled its disciplinary objectives of protecting the public, deterring other licensees from engaging in similar misconduct and promoting Saculla's rehabilitation. The Department filed a petition for a rehearing which the Board denied.

Thereafter, Saculla sought judicial review of the Board's final decision and order and the Board's order denying the Department's petition for a rehearing, pursuant to § 227.52, STATS. The trial court concluded that there was substantial evidence to support the Board's "overall decision and particularly the credibility of Kathy on her claim of sexual contact with [Saculla]." The trial court further concluded that Saculla's claims of privilege were not supported in fact or law and that Saculla was afforded full due process protections. Saculla appeals.

STANDARD OF REVIEW

In reviewing a circuit court's ruling on an administrative decision, we review the department's decision even though we affirm or reverse the court order. *Barakat v. DHSS*, 191 Wis.2d 769, 777, 530 N.W.2d 392, 395 (Ct. App. 1995). However, the circuit court's reasoning may be used to assist our review. *Richland Sch. Dist. v. DILHR*, 166 Wis.2d 262, 273, 479 N.W.2d 579, 584 (Ct. App. 1991),

aff'd, 174 Wis.2d 878, 498 N.W.2d 826 (1993). The subsections of § 227.57, STATS., delineate the specific scope of both the trial court's and our review of each issue presented by the parties. Saculla challenges the Board's decision under two of these provisions.

I. Sufficiency of the Evidence

Two of Saculla's arguments on appeal are that the evidence does not support the factual allegations in the complaint or the Board's decision. Saculla argues that the Board relied on only one witness, Kathy, who has given conflicting stories, recanted her complaint and "committed perjury," and the Board ignored Saculla's explanation of the events. Saculla further argues that the Board's decision is based upon "only two percent of the hearing testimony . . . [and] ignores the testimony of many witnesses which supports but one conclusion – Saculla is innocent."

Whether a physician has engaged in behavior with a patient constituting unprofessional conduct is a question of fact to be determined by the board. *See General Casualty Co. v. LIRC*, 165 Wis.2d 174, 178, 477 N.W.2d 322, 324 (Ct. App. 1991). The board's factual findings are conclusive if they are supported by credible and substantial evidence. *Id.*; § 227.57(6), STATS. "Indeed, as long as there is credible evidence to support the findings, we will uphold them even if they are against the great weight and clear preponderance of the evidence." *General Casualty*, 165 Wis.2d at 178, 477 N.W.2d at 324 (citing *Goranson v. DILHR*, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278 (1980)). Thus, "[w]here . . . the credible evidence supporting the

[board's] decision is sufficient to exclude speculation or conjecture, we may not overturn [that decision]." *Id.* at 179, 477 N.W.2d at 324.

In addition, the credibility of the witnesses and the persuasiveness of their testimony are for the board, not the courts, to determine. *L & H Wrecking Co. v. LIRC*, 114 Wis.2d 504, 509, 339 N.W.2d 344, 347 (Ct. App. 1983). In applying the credible evidence test to the findings of the agency, a reviewing court does not weigh conflicting evidence to determine which should be believed. *See id.* If there is credible evidence to sustain the findings, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm. *Id.*

However, the board is not required to justify its decision; the burden is on the challenger to show that the decision should be overturned. *Racine Educ. Ass'n v. Commissioner of Ins.*, 158 Wis.2d 175, 182, 462 N.W.2d 239, 242 (Ct. App. 1990). It follows that our role on appeal is to review the record for credible and substantial evidence supporting the board's decision, rather than to search for or weigh opposing evidence. *Kimberly-Clark Corp. v. LIRC*, 138 Wis.2d 58, 67, 405 N.W.2d 684, 688 (Ct. App. 1987).

Saculla urges this court, after reviewing the record – specifically, the evidence *he* finds most compelling – to overturn the Board's decision. However, we are not to weigh conflicting evidence to determine which should be believed. Rather, if there is credible evidence to sustain the findings, irrespective of whether there is evidence that might lead to the opposite conclusion, we must affirm. Review of the record leads us to conclude that

there is substantial evidence to support the Board's findings.

The Board recognized that the central issue was Kathy's credibility. It had a difficult decision to make in this regard because it was faced with contradictions and conflicts in her testimony.[1] However, the Board was also required to consider Saculla's conduct in this incident. The Board determined that the sexual contact, the three at-home visitations by Kathy, the violation of MCMHC employment rules, the exchange of gifts, the cessation of discussions of "transference" with Kathy's mother and the ruse regarding Saculla's anatomy made it more likely than not that Kathy was being truthful. Saculla had the opportunity to explain away these actions; however, he chose not to testify. Although Saculla disagrees with the Board's conclusion, it is supported by credible and substantial facts in the record.

Moreover, it is clear from the Board's decision that it conducted the proper sifting and winnowing process to

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[1] On March 5, 1993, Kathy left a note for Zwieg which expressed her concern that her testimony would not be used in her best interest and she therefore did not wish to continue with the matter. Nevertheless, the Department issued a complaint against Saculla on behalf of the Board on March 10, 1993. *See Sailer v. Wisconsin R.E. Brokers' Bd.*, 5 Wis.2d 344, 351, 92 N.W.2d 841, 845 (1958).

On April 22, 1993, Kathy gave a written statement to Saculla's private investigator. Kathy stated that due to her mental state at the time, she could not positively state that any sexual incident ever occurred. The Board found her testimony at the hearing, describing one sexual incident, to be truthful, and her contrary statement in the affidavit to be false. We accept the Board's credibility determination.

reach its final determination on credibility. In particular, the Board addressed the challenges to Kathy's credibility by the conflicting expert testimony; it considered Kathy's hesitancy to participate in the proceedings, as well as her "recantation" given to Saculla's investigator; it addressed Kathy's inconsistent statements regarding the number of sexual contacts; and it discussed Kathy's difficulties at work. Nevertheless, the Board concluded that:

> [the discussion of Kathy's credibility] provide[s] the material basis upon which it is concluded that it is more likely than not that Dr. Saculla engaged in sexual activity with his patient, Kathy. . . . Dr. Saculla's conduct and his subsequent taking of the Fifth Amendment make it likely that the encounter occurred, and serve to outweigh the difficulties in proof presented by Kathy's psychological problems, history and attempts to have this case dismissed.

These are the precise determinations – the credibility of the witnesses and the persuasiveness of their testimony – which are to be left to the Board, and not to the courts. Accordingly, we affirm the trial court's conclusion that "[s]ubstantial evidence does exist to support the [Board's] overall Decision and particularly the credibility of Kathy on her claim of sexual contact with [Saculla]."

II. Abuse of Discretion

Saculla's next argument is that the Board's decision in this case lacks the required reasoning process, as exemplified in other disciplinary cases, and constitutes an abuse of discretion. Saculla analogizes his case to a prior, unrelated Board decision which resulted in dismissal of

the complaint against the other physician. Saculla theorizes that since "Kathy exhibited all of the symptoms and had the same diagnosis as the patient in their previous 1990 decision," which was dismissed for lack of evidence, it follows that his case should also be dismissed.

However, this ignores the common precept that any judicial body is to consider each case on its own merits. *See Voigt v. State*, 61 Wis.2d 17, 22, 211 N.W.2d 445, 448 (1973) (it is presumed that the trial judge, in fidelity to his oath of office, will try each case on its merits). The administrative nature of these proceedings does not preclude application of this precept. The Board properly based its decision on the particular facts before it and not on previous disciplinary proceedings.

III. Board's Adverse Inferences

Saculla further contends that the Board erroneously drew adverse inferences from: (1) Saculla's refusal to testify prior to Kathy; and (2) Saculla's precomplaint request that Kathy be deposed and asked to describe his anatomy. Saculla contends that his refusal to testify was legally justified. He further argues that "Kathy's detailed description of [his] anatomy was inaccurate and supports the conclusion that the alleged oral sex did not occur . . . ." We conclude that the adverse inferences drawn by the Board are supported by law.

A. Saculla's Refusal to Testify

Saculla contends that his refusal to testify was legally justified. He maintains that: (1) the State had no right to

call him adversely when the allegation involved alleged criminal conduct; (2) the Board had no right to draw an adverse inference from Saculla's refusal to testify based upon his Fifth Amendment right against self-incrimination; (3) under the physician-patient confidentiality requirements and § 905.04, STATS., he was precluded from testifying without a waiver by Kathy; and (4) the Board failed to consider all of the evidence before drawing its adverse inference. Saculla's first two contentions are that Wisconsin law prohibits calling him adversely in a civil case when the allegation also involves a potential criminal violation and that an adverse inference may not be drawn against him for refusing to testify under the Fifth Amendment. These claims are unpersuasive.

Since the administrative disciplinary hearing was a civil proceeding and not a criminal proceeding, *see State v. Preston*, 38 Wis.2d 582, 588c, 159 N.W.2d 684, 685 (per curiam addendum to original case), *cert. denied*, 393 U.S. 981 (1968), the rules of criminal procedure are inapplicable. Moreover, the supreme court has held "that an inference of guilt or against interest of the witness may be drawn as a matter of law from the invocation of the fifth amendment in a civil suit. The inference which may be drawn depends upon the question asked and the weight to be given the inference depends upon the facts." *State v. Postorino*, 53 Wis.2d 412, 417, 193 N.W.2d 1, 3 (1972) (quoting *Grognet v. Fox Valley Trucking Serv.*, 45 Wis.2d 235, 239, 172 N.W.2d 812, 815 (1969)). Therefore, we must accept the findings of the Board, which include the adverse inferences taken from Saculla's refusal to respond to virtually all of the questions posed to him by the complainant's attorney. *See id.*

Saculla's third argument is that physician-patient confidentiality prohibited him from testifying. Saculla maintains that his refusal to testify under the physician-patient privilege is justified based upon Kathy's original medical release authorization which expired on December 31, 1991, and Kathy's notice of withdrawal to the state's attorney, which was formalized in an April 22, 1993, sworn statement. We disagree.

The physician-patient privilege is codified under § 905.04(2), STATS., which provides in part: "A patient has a privilege . . . to prevent any other person from disclosing confidential communications made or information obtained . . . for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition . . . ." A privilege holder waives the privilege if he or she voluntarily discloses or consents to disclosure of any significant part of the matter or communication. Section 905.11, STATS. Accordingly, if Kathy, as the holder of the privilege, voluntarily consented to the inspection of any given medical record by the Board, then she waived the patient privilege under § 905.04 as to that record. *See Borwardt v. Redlin*, 196 Wis.2d 342, 354-55, 538 N.W.2d 581, 586 (Ct. App. 1995).

Kathy signed a second consent for release of information authorizing Saculla to provide all members of the Board and the Department with any medical records in his possession or under his control, including but not limited to mental health/psychiatric treatment records pertaining to Kathy. The release also authorized Saculla to discuss with the Board or Department any matters relating to Kathy's treatment. The release was effective until December 31, 1993, and any information obtained as

a result of the consent could be used after the expiration date or revocation.

We conclude, as did the Board, that Kathy's authorization constituted a valid waiver of her physician-patient privilege with Saculla through the expiration date. Saculla's testimony was taken on November 15, 1993, well within the expiration of the authorization. At the hearing, the parties presented arguments regarding the validity of the waiver and the Board concluded that the authorization "establish[ed] . . . that the patient-physician privilege [was] waived," and so found "for the purpose of permitting Dr. Saculla to testify in this matter."

Saculla still refused to testify throughout the hearing, but his refusal was not based upon the physician-patient privilege. In fact, Saculla never invoked this privilege throughout the hearing and the Board did not draw an adverse inference from Saculla's argument that the physician-patient privilege barred his testimony.

Instead, Saculla invoked the Fifth Amendment to all of counsel's questions. An inference of guilt may be drawn as a matter of law from the invocation of the Fifth Amendment in a civil suit and the weight to be given the inference depends upon the facts. *See Postorino*, 53 Wis.2d at 417, 193 N.W.2d at 3. Here, the Board drew an adverse inference from Saculla's invocation of the Fifth Amendment, which when combined with Saculla's conduct "[made] it more likely Kathy is telling the truth . . . ." The Board was entitled to draw this adverse inference and we must defer to the Board's determination of the credibility

of the witnesses and the persuasiveness of their testimony. *L & H Wrecking*, 114 Wis.2d at 509, 339 N.W.2d at 347.

Lastly, Saculla argues that the Board failed to consider his "ongoing cooperation with State officials dating back to 1990, and failed to consider [his] sworn deposition testimony, the waiver of his attorney/client privilege and the testimony of Judge Harvey." Saculla again urges this court to reexamine the Board's factual findings and its determinations of the witnesses' credibility. The Board's factual findings are conclusive if they are supported by credible and substantial evidence. Section 227.57(6), STATS. In addition, the credibility of the witnesses and the persuasiveness of their testimony are for the Board to determine, not the court. L & H Wrecking, 114 Wis.2d at 509, 339 N.W.2d at 347. In applying the credible evidence test to the findings of the agency, we do not weigh conflicting evidence to determine which should be believed. *See id.* If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to the opposite conclusion, we must affirm. *See id.* The Board's decision is supported by credible evidence and we therefore affirm.

B. Request for Anatomical Description by Kathy

Saculla maintains that the Board erroneously drew an adverse inference from his request in February 1993 that Kathy be deposed and asked to describe his genitalia. The controversy is that Kathy filed her allegations with

MCMHC in March 1990. On March 12, 1991, a circumcision was performed on Saculla. The medical records indicated that Saculla complained of "a decrease in the force and caliber of his stream, . . . phimosis [a stricture of the foreskin which reduces its elasticity] and occasional ballanitis [an inflammation of the mucous membrane covering the glans penis] and he would like a circumcision." Yet, the surgeon's notes prior to and during the operation indicated that everything was normal.

The problem for the Board was that the surgery, which was performed upon Saculla after the alleged misconduct, resulted in the removal of the foreskin from his penis and "obviously would have altered at least its flaccid appearance from that which possibly would have been observed in late 1989 by Kathy." Therefore, Kathy's physical description of Saculla's penis would have been inconsistent with its actual condition in 1993. The Board noted that:

> [f]rom the medical records, then, there does not appear to have been any objective or observable confirmation of the presenting complaints of Dr. Saculla. This does not necessarily mean, although it could be reasonably inferred from this record, that Dr. Saculla simply desired to have the foreskin of his penis removed for some reason other than an existing legitimate medical cause.

The Board concluded that Saculla's

> demand to the state in 1993 that Kathy be required to describe his genitals, as she would have observed them in 1989, was deceitful given the surgical procedure which had been performed in the interim. To the extent she would

> be able to testify to his not having been circumcised, she would be lying. Although, Dr. Saculla's attempt at deception was not successful, it is extremely damaging to his position.

The Board determined that without clarification from Saculla himself (Saculla chose not to testify pursuant to his Fifth Amendment constitutional right against self-incrimination), it is reasonable to draw an adverse inference from the evidence of record.

The Board's factual findings are conclusive if they are supported by credible and substantial evidence. Section 227.57(6), STATS. The board is not required to justify its decision; the burden is on the challenger to show that the decision should be overturned. *Racine Educ. Ass'n*, 158 Wis.2d at 182, 462 N.W.2d at 242. It follows that our role on appeal is to review the record for credible and substantial evidence supporting the board's decision, rather than to search for or weigh opposing evidence. *Kimberly-Clark*, 138 Wis.2d at 67, 405 N.W.2d at 688.

Saculla contends that the Board "misunderstood critical evidence." He argues that the Board based its adverse inference upon the "State's closing argument and the testimony of Mr. Nash," as well as upon the Board's misunderstanding that Saculla "had undergone a circumcision in the month following his February 1993, meeting with Jack Zwieg and that this operation had been done to change his anatomy and thereby to 'deceive them.' " These arguments ignore not only the Board's decision, but also our role on review.

It is clear that the Board mainly drew its adverse inference from Saculla's medical records which were submitted at the hearing. On appeal, our role is to review the record for credible and substantial evidence supporting the Board's decision, rather than to search for or weigh opposing evidence. The only evidence brought before the Board provides support for the adverse inference taken. Saculla has failed to demonstrate why we should overturn the Board's decision. Accordingly, we affirm.

IV. Due Process

Saculla's final argument is that he was deprived of due process. Section 227.57(4), STATS., provides in part: "The court shall . . . remand the case to the agency for further action if it finds that . . . the fairness of the proceedings . . . has been impaired by a material error in procedure or a failure to follow prescribed procedure."

Saculla claims that the Board violated his right to due process in two respects. First, the Board did not give him fair notice and an opportunity to be heard with respect to his conduct. Second, the Board limited his license despite its inability to obtain the required two-thirds vote of the majority membership pursuant to § 15.08(4), STATS.

A. The Right to Notice and an Opportunity to be Heard

This issue involves a question of constitutional fact which we review without deference to the agency. *Hakes v. LIRC*, 187 Wis.2d 582, 586, 523 N.W.2d 155, 157 (Ct.

App. 1994). Our supreme court has delineated due process of law in agency proceedings as follows:

> [D]ue process . . . requires notice of hearing and description of the issue, the right to present witnesses and cross-examine. . . . [F]indings of fact and conclusions of law must be made. And equally important, the standard of review is substantial evidence in view of the record as a whole. . . . While due process must be extended . . . this does not mean that all of the procedural niceties of a judicial trial must be observed.

Kropiwka v. DILHR, 87 Wis.2d 709, 714, 275 N.W.2d 881, 884, *cert. denied*, 444 U.S. 852 (1979) (quoted sources omitted; citations omitted). In addition, there is a presumption of regularity in the decisions of administrative agencies, and the petitioner has the burden of establishing that his or her right to due process of law was violated. *See Hakes*, 187 Wis.2d at 586-87, 523 N.W.2d at 157.

Saculla has failed to demonstrate that the Board violated his due process rights. Rather, it is clear that Saculla was provided with "all of the procedural niceties" of a judicial trial – notice of the hearings and the charges against him; the right to counsel; the right to present and to cross-examine witnesses; the right to be present during the hearing; the right to testify or remain silent; the right to written and detailed findings of fact and conclusions of law; the application of the appropriate standard; and the right to appeal. As noted by the trial court, "[Saculla] didn't get the result he sought, but he did receive full due process." We conclude that Saculla has failed to establish

that his constitutional due process rights were violated during the medical board hearings.

B. Violation of § 15.08(4), STATS.

Saculla also argues that because the Board was unable to obtain the required two-thirds vote of its membership, under § 15.08(4), STATS., it was obligated to dismiss the complaint. This argument is without merit.

The general powers of examining boards and councils allow the board to "limit, suspend or revoke, or reprimand the holder of, any license, permit or certificate granted by the examining board." Section 15.08(5)(c), STATS. Section 15.08(4) requires:

> (a) A majority of the membership of an examining board constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the examining board.
>
> (b) Notwithstanding par. (a), no certificate or license which entitles the person certified or licensed to practice a trade or profession shall be suspended or revoked without the affirmative vote of two-thirds of the membership of the examining board.

Based upon the restrictions in § 15.08(4), STATS., the Board imposed the following limitations on Saculla's license: (1) prohibited the treatment of females of any age; (2) direct on-premises supervision by another physician; (3) submit written quarterly reports prepared by practice supervisor; (4) arrange for a psychological evaluation relating to the issues raised in the Board's findings

of fact; (5) if psychotherapy is deemed necessary, to submit written quarterly reports prepared by the treating psychiatrist; and (6) provide current authorizations for release of all of his medical and treatment records to the Board. Through these limitations, the Board was attempting to fulfill the accepted disciplinary objectives of protecting the public, deterring other licensees from engaging in similar misconduct, and promoting Saculla's rehabilitation. The Board's explanations for these conditions are reasonable, and clearly, § 15.08 allows for such limitations.

Moreover, Saculla has not articulated how the limitations to his license relate to his alleged denial of due process. Because this argument is undeveloped, we decline to consider it further. *See Fritz v. McGrath*, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988) (appellate court does not consider arguments "broadly stated but never specifically argued").

Conclusion

In sum, we conclude that substantial evidence exists to support the Board's decision and particularly the credibility of Kathy on her claim of sexual contact with Saculla. We further determine that the Board's decision did not constitute a misuse of discretion. We also hold that the adverse inferences drawn by the Board are supported in both law and fact. We further conclude that Saculla's constitutional due process rights were not violated during the medical board hearings or by the Board's limitations on Saculla's license. Accordingly, we affirm the trial court's order affirming the Board's limitation of

Saculla's medical license based upon the Board's finding that Saculla engaged in unprofessional conduct, in violation of § 448.02(3), STATS., and WIS. ADM. CODE § MED. 10.02(2)(h), by having sexual contact with a patient.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.

(Seal)

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You are hereby notified that the Court has entered the following order:

No. 95-1489 *Saculla v. State of Wis. Med. Exam. Bd., et al.*
L.C.#94CV2323

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of petitioner-appellant-petitioner, Francois J. Saculla, M.D., and considered by the Court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN : CIRCUIT COURT :
RACINE COUNTY BRANCH 8

FRANCOIS J. SACULLA, M.D.,

Petitioner,

vs.

STATE OF WISCONSIN MEDICAL EXAMINING BOARD, DEPARTMENT OF REGULATION AND LICENSING,

Respondent.

DECISION and ORDER

Case No. 94-CV-2323

INTRODUCTION

This instant Petition for Judicial Review under 227.52, Stats., was filed on 9 December 1994. It challenges the Final Decision and Order of 25 November 1994, of the State of Wisconsin Medical Examining Board (Board). The Department of Regulation and Licensing (Department) filed on 8 December 1994, a Petition for Rehearing. The Petition for Rehearing was denied by the Board in a written Decision of 27 December 1994. On 16 December 1994, the Petitioner filed a Motion for Stay with respect to the Board's 25 November 1994, Final Decision and Order.

A Hearing was held on the Motion for Stay on 22 December 1994. Dr. Saculla and his attorney, Ms. Woehrer appeared. The Board appeared by its attorney, Mr. Johns. The Department appeared by its attorney, Mr. Zweig. After input from all parties the court denied the Motion

for Stay and, at the request of the parties, established a briefing schedule. A written Order denying the Motion for Stay was signed on 18 January 1995.

The entire case record was filed on 4 January 1995, as required under 2277.55, Stats..

An amended Petition for Judicial Review was filed by Petitioner on 9 January 1995, in order to have the review also encompass the Board's 27 December 1994 ruling on the Department's Petition for Rehearing.

Attorney Zweig filed a Notice of Appearance on behalf of the Department on 16 January 1995. Essentially Mr. Zweig asserts the Department should not be a party to this case. However, it is the position of the Department that Decisions of the Board be affirmed. The final statement of the Department's position is that it will seek its own Petition for Judicial Review in order to modify the Board's Decisions so as to revoke Petitioner's license.

Attorney Johns filed, on behalf of the Board, a Notice of Appearance and Statement of Position on 29 December 1995.

Petitioner's brief was due on 9 February 1995. The briefs of the Board and the Department were due on 9 March 1995. The reply brief of Petitioner was due on 9 April 1995.

There has apparently been a Petition for Judicial Review filed by Attorney Zweig in Dane County as Case No. 95-CV-255 which has been assigned to the very able Circuit Court Judge Mark A. Frankel. This information is obtained from a copy of a letter (in file) sent to this court

which was addressed to Judge Frankel by Attorney Woehrer.

FACTS

Petitioner is a medical doctor with a specialty as a psychiatrist. On 14 October 1989, he met a 30 year old patient (Kathy) at the Milwaukee County Health Center (MCMHC). She had been brought to his ward by Greenfield police for emergency detention relating to aggression against her mother. This hospital stay lasted 20 days (until 3 November 1989). Dr. Saculla was employed as a psychiatrist at MCMHC from March 1989 to 15 January 1990.

During Kathy's first stay at MCMHC she was grossly psychotic, acted unpredictably and made abuse allegations against her parents. After discharge Kathy called Dr. Saculla's home and left messages on his machine. She also showed up once at his home in Racine during November 1989. She accompanied him on an errand and then left. Dr. Saculla telephoned Kathy's mother regarding Kathy's behavior and infatuation.

On 16 November 1989, Kathy was hospitalized at Waukesha Memorial Hospital by Dr. Michael Biehl. During this stay she was delusional and disoriented as to time. After 4 days she was transferred to MCMHC where she remained for 9 days under the care of Dr. Saculla. Kathy exhibited behavior in the second stay at MCMHC which was delusional, paranoid and angry. On 28 November 1989, the date of her discharge from MCMHC, Dr. Saculla wrote to Kathy's employer recommending disability consideration. The discharge note from Dr.

Saculla on 28 November 1989, indicates a continuing care plan that would have him follow Kathy in the outpatient mental health clinic with the next appointment being 5 December 1989. This appointment occurred and Dr. Saculla's note on that date indicates that Kathy would continue to be seen on an outpatient basis.

In order to facilitate the disability application of Kathy, it was necessary for Dr. Saculla (the treating physician) to provide a comprehensive medical report. Between 20 November 1989, and 25 December 1989, Kathy met with Dr. Saculla at his Racine home on 3 occasions. Petitioner asserts that the first visit was to have the disability forms brought to his home. The other two visits were to pick up the forms. Respondent Board found and Kathy claimed that on one of those three visits, Dr. Saculla and Kathy engaged in sexual conduct (oral sex on Dr. Saculla by Kathy).

Petitioner points out that he was working very long hours at MCMHC and had responsibility for 2 inpatient wards. Resources at MCMHC were limited and he was directed by his superior to limit the number of reports he submitted for transcription. He also points out that Kathy was sexually active with her long-term boyfriend during the very period she visited his home on three occasions.

Additional outpatient visits at MCMHC occurred between Petitioner and Kathy on 12 December 1989, and 3 January 1990. The last note in Kathy's treatment record by Dr. Saculla indicates that the patient will return in a month or as needed.

Dr. Saculla was himself hurt at work on 28 December 1989. His employment at MCMHC ended on 15 January 1990.

Kathy continued to experience severe mental problems. Her family called Dr. Saculla in February 1990, and he met with them at their home. His advice was to seek an involuntary commitment of Kathy. This was done through Milwaukee County.

In mid-March 1990, Kathy delivered a one-page letter to the head of MCMHC. In this letter she related that Dr. Saculla had sex with her at his Racine home. She further asserted that Dr. Saculla had administered prescriptions to her. This letter was given to Dr. Ronald Cromwell, an administrator of MCMHC. He met with Kathy and she then stated that the sexual contact occurred after Dr. Saculla left his employment with MCMHC. The one- page letter was forwarded to both the Racine Police Department and the State of Wisconsin Medical Licensing Board.

On 21 March 1990, Kathy was admitted for the third time as an inpatient at MCMHC She continued to exhibit paranoia. This hospital stay ended on 6 April 1990.

Kathy was admitted to MCMHC for a fourth time from 25 April 1990, to 31 May 1990. She continued to exhibit delusional and paranoid behavior. No criminal charges were ever brought as a result of Kathy's claims regarding her parents, her brother, police officers and hospital staff.

On 14 May 1990, (while a patient at MCMHC), Kathy gave a statement to Racine Police Investigator Jan Berndt. She told Inv. Berndt that on three occasions between

Thanksgiving and Christmas 1989, she performed fellatio on Dr. Saculla at his request. This statement was reduced to an affidavit by investigator Berndt. Sadly, this very fine officer died prior to the hearing before the Board. Claims by Kathy that she had numerous phone conversations with Dr. Saculla, that he had prescribed many prescriptions for her and that he had pornographic films in his home proved baseless – even though they were used, in part, to support warrant request.

On 17 September 1990, Dr. Saculla and his attorney met with, and gave a statement to, an investigator from the Board. A report on the meeting was received at the hearing as Exhibit 15.

The next contact regarding this case and Dr. Saculla occurred on 17 February 1993. It took place in Madison and involved Dr. Saculla, a prosecuting attorney and an investigator. Dr. Saculla again denied any sexual contact and requested that the State investigate Kathy.

A few weeks later (5 March 1993) Kathy appeared at the office of the prosecuting attorney. She advised that she was requesting that the complaint be dropped. A short time later she confirmed that statement both by fax and a phone call.

The complaint in this case issued on 10 March 1993. It alleged unprofessional conduct by 3 acts of sexual conduct in Racine between Dr. Saculla and Kathy (his patient) during the period between Thanksgiving and Christmas of 1989.

On 22 April 1993, Kathy met with Dr. Saculla's investigator and gave a sworn statement. She noted her

attempt at withdrawal of the complaint, her opinion that she would be an unreliable witness and her view that her memory was such that she wasn't sure that the alleged sexual incidents ever occurred.

The hearing on this matter took place on 8 days between 15 November 1993, and 7 January 1994, before ALJ Donald Rittel.

Kathy testified. Dr. Saculla was called, but he refused to testify even though Kathy authorized him to discuss all aspects of her treatment. See Exhibit 3 and Record 698-701. She clearly was reluctant to do so. Her credibility was at issue. ALJ Rittel concluded that Kathy's 5 March 1993 withdrawal of her complaint and her 22 April 1993 statement to an investigator reflected her belief that "retraction would end her having to participate in this proceeding." Ultimately ALJ Rittel found Kathy credible and unequivocal in her claim (Record 4538 and 4539) of sexual conduct with Dr. Saculla on one occasion. In addition, an adverse inference was drawn against Dr. Saculla in this civil matter as a result of his refusal to testify. ALJ Rittel concluded that Kathy's mental condition did not prevent her from accurately perceiving and recalling events at issue. In addition to Dr. Saculla not testifying, it was pointed out that his treatment notes at MCMHC never mentioned Kathy's visits to his Racine home. This activity was understood by Dr. Saculla to be contrary to his employer's express written policy. It was viewed as deception. So too was Dr. Saculla's request that Kathy describe his genitalia and, if she did, thereafter he would submit himself for a physical examination. The problem, as Dr. Saculla knew, was that he had had surgery performed, after the alleged professional misconduct, which

removed the foreskin from his penis. This circumcision was performed, as Petitioner points out, two years before Petitioner met with Attorney Zweig on 16 February 1993. ALJ Rittel viewed this examination ploy as "extremely damaging" to the position of Dr. Saculla.

The Board, in its Decision of 25 November 1994, adopted the ALJ's proposed reasoning, Findings of Fact and Conclusions of Law. It, however, ordered that the license of Dr. Saculla be limited, as opposed to revoked.

Consideration was also given to Petitioner's 18 witnesses. Two experts (a psychiatrist and a psychologist) testified that the care provided by Petitioner to Kathy met all required standards. In addition, the record contained data regarding Petitioner's 1991 circumcision and erectile dysfunction. The remaining witnesses testified regarding, among other things, Dr. Saculla's good character, Kathy's impeachment statements, Kathy's paranoid and delusional behavior and Kathy's poor reputation for truthfulness. No fact witness rebutted Kathy in her core claim of sexual conduct with Petitioner. Dr. Saculla presumably could have, but he refused to testify – relying instead on the impeachment of Kathy, her credibility and her reputation.

LAW

The Board possesses the power to make decisions regarding charges against a doctor relating to unprofessional conduct. *Sailer v. Wisconsin R.E. Broker's Board*, 5 Wis. 2d 344 (1958) and Chapter 448, Wisconsin Statutes. Petitioner has a right to obtain judicial review regarding the Board's Decision. 227.53, Stats.. The general purposes

served by the imposition of discipline by a Board were noted in *State v. Aldrich,* 71 Wis. 2d 206 (1976) as follows:

1. Promote rehabilitation of license
2. Public protection.
3. Deterring other licensees from misconduct.

It is important to note that the agency, and not any complaint, makes the decision regarding whether or not to file an action against a doctor.

The initial task of the court is to review the entire record and the Decision to determine if the action taken was reasonable under a substantial evidence test. In *Hamilton v. ILHR,* 94 Wis.2d 611 at (1980), our Supreme Court said:

> "The agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."

As to the concept of substantial evidence in the entire record, the court notes *State ex rel Eckmann v. DHSS,* 114 Wis. 2d 35 at 43 (C.A. 1983):

> "The test which must be met. . . . is the substantial evidence test, a standard not quite on par with the preponderance of the evidence test. In *Robertson Transportation Co., Inc. v. Public Service Commission,* 39 Wis.2d 653, 658 (1968), the supreme court described substantial evidence as: '[T]hat quantity and quality of evidence

> which a reasonable man could accept as adequate to support a conclusion.' "

More recently in *Hoell v. LIRC*, 186 Wis. 2d 603 at 614 (C.A. 1994), it was stated:

> "The substantial evidence standard is met when, upon examining the entire record, the evidence, including any inferences therefrom, is found to be such that a reasonable person might have reached the decision. We must search the record to locate substantial evidence which supports LIRC's decision."

The decision of the Board is entitled to great weight in this case since the agency has longstanding experience and competence in the type of matter at issue. See *Hubert v. LIRC*, 186 Wis. 2d 590 at 597 (C.A. 1994):

> "Because LIRC has longstanding experience, technical competence and specialized knowledge in administering the unemployment compensation statutes, we conclude that its interpretation and application of those statutes is entitled to great weight. Under this standard, we uphold LIRC's interpretation and application of the statute as long as it is reasonable and consistent with the statute's language, regardless of whether other interpretations are reasonable."

Three possible levels of deference exist. They were discussed in *Kelly Co., Inc. v. Marquardt*, 172 Wis. 2d at 244 (1992):

> "This court has applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. *Jicha v. DILHR*, 169 Wis. 2d 284, 290, 485 N.W. 2d 256 (1992); *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.

> 2d 267 (1991). First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to 'great weight.' *Jicha,* 169 Wis. 2d at 290-91; *Sauk County,* 165 Wis. 2d at 413. The second level of review is a mid-level standard that provides if the agency decision is 'very nearly' one of the first impression it is entitled to 'due weight' or 'great bearing.' *Jicha,* 169 Wis. 2d at 291; *Sauk County,* 165 Wis.2d at 413-14. The third level of review is de novo and is applied when the case is clearly one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented."

In a tax case the Appellate Court addressed the concept as follows in *Nelson Bros. v. Revenue Dept.* 152 Wis. 2d 746 at 753 (C.A. 1989):

> "We accept the agency's findings of fact if they are supported by substantial evidence in the record, *Wehr Steel Co. v. ILHR Dept.,* 106 Wis. 2d 111, 117 (1982), and, generally, we decide the legal questions independently. *Dept. of Revenue v. Milwaukee Refining Corp.,* 80 Wis. 2d 44, 48 (1977). Where, however, the agency has particular competence or expertise in the matter at hand, we will sustain its legal conclusions as long as they are rational. *Wis. Power & Light v. Pub. Serv. Comm.,* 148 Wis.2d881, 887 (CA 1989)."

When the Board considers the evidence presented by the parties, it is responsible for resolving issues of credibility and determining what weight to give to the evidence. See Wisconsin Jury Instructions-Civil Number 215 and *Neff v. Industrial Commission,* 24 Wis. 2d 207 (1964).

Also, in Wisconsin, a presumption of regularity exists regarding the procedures of the Board. The court said in *Hakes v. LIRC,* 187 Wis. 2d 581 at 585 (C.A. 1994):

> "In reviewing this issue, we note that there is a presumption of regularity in the decisions of administrative agencies. Furthermore, we note that Hakes has the burden of showing that the procedures employed by the commission violated her right to due process of law."

The burden is on Petitioner to establish any due process violation. The decision of the Board is independent of the Administrative Law Judge. *Hamilton v. ILHR Dept.,* 94 Wis. 2d 611 (1980). Single or multiple acts of professional misconduct can provide a basis for a sanction. *Vivian v. Examining Board of Architects,* 61 Wis. 2d 627 (1974).

Reversal of an administrative agency can occur under 227.57(6) Stats., if the Petitioner can demonstrate that the findings are not supported by substantial credible evidence in the entire record or that the Board proceeded on an erroneous understanding of the law. *Leob v. Board of Regents,* 29 Wis. 2d 159 (1965).

The duty of the court is to review the record to see if the decision made is supported by substantial evidence. The court is not to conduct an examination with a view toward seeing if another different, but reasonable, decision could have been reached. Such a review would have the court weigh the evidence and determine credibility. This is not possible. *Consolidated Papers, Inc. v. DILHR,* 76 Wis. 2d 210 (1977) and *Appleton Electric Co. v. Minor,* 91 Wis. 2d 825 at 829 (1979).

In the opening instructions (WJI-Civil #50) to jurors in Wisconsin it is noted that perhaps the most difficult task that befalls the trier of fact is that of determining credibility. Once a final decision is made, it is not lightly set aside. The fact finder may believe one witness' version even though other credible evidence exists toward a contrary view. In this case the Department, under 440.20(3), Stats., had the burden of a preponderance of the evidence. The fact finder is required to also evaluate conflicting evidence – whether in one witness or among many. *Gandhi v. Medical Examining Board,* 168 Wis. 2d 299 (C.A.1992).

Both the decision of the Board and of this court must reflect the proper exercise of discretion. The past year our Supreme Court addressed that standard in *State ex rel Cynthia v. Michael,* 181 Wis. 2d 618 at 624 (1994):

> "The term discretion contemplates a process of reasoning which depends on facts that are in the record or are derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards."

Wisconsin's seminal case on this issue is that written by our Chief Justice 7 years into his 31 years on the Court in *McCleary v. State,* 49 Wis. 2d 263 at 277 (1971).

Another concept to be considered is that of arbitrariness. Twice in 1994, the Court of Appeals dealt with this issue. *Incorporation of Town of Pewaukee,* 186 Wis. 2d 515 at 522 (C.A. 1994).

> "The test for whether a determination is arbitrary or capricious is whether it can be said that such an action does not have a rational basis."

In *Van Arx v. Schwarz,* 185 Wis. 2d 645 at 656 (C.A. 1994) it was stated:

> "An agencies decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards.

One of the claims made by Petitioner is that he has been denied due process. To answer the assertion it is first necessary to define the term. Due process relates to the minimun procedure required before a citizen can be deprived of a right or be disciplined. Usually its hallmarks are written notice of the alleged wrong, a right to examine witnesses, a right to testify and call witnesses and present evidence, a right to be represented by counsel, a written statement from the fact finder regarding evidence relied on and the reasons for the decision made, jurisdictional limitations on the actual exercise of discretion and restrictions on dispositional action allowed. Fairness is at the core of due process. *Robinson v. McCaughtry,* 177 Wis. 2d 293 (C.A. 1993) and *Butuminous Casualty Co. v. ILHR,* 97 Wis. 2d 730 (C.A. 1980).

Another issue between the parties relates to the negative inference drawn when Petitioner was called by the Department and then refused to testify. The hearing is clearly civil in nature as opposed to criminal. Respondent Board cites the court to *State v. Postorino,* 53 Wis. 2d 412 at 416 (1972) as follows:

> Taking the fifth amendment does not foreclose a court in a civil action from drawing an inference

> from the invocation of the fifth amendment on an issue involving grounds for discipline. A disciplinary proceedings, such as this is a civil proceeding and so designated by sec. 256.28(12), Stats., and this court has often said a disciplinary proceeding was a civil proceeding and not a criminal one."

The inappropriate use of this right in civil cases has been referred to as the utilization of privilege and right as both a sword and a shield. *Kisting v. Westchester Fire Insurance Co.*, 290 F. Supp. 141 (1968). While Petitioner has a right to refuse to testify, he also may not be disciplined for that act. *Spevack v. Klein*, 385 U.S. 511 (1967). Yet, in civil cases it is permissible to draw an adverse inference in Wisconsin. *Grognet v. Fox Valley Trucking Service*, 45 Wis. 2d 235 (1969).

Reliance on a single witness is not unusual in sexual misconduct cases. It does, however, present special problems. In *Ianni v. Grain Dealers Mutual Insurance Co.*, 42 Wis. 2d 354 (1968) our highest court noted that, when the testimony is conflicting, there must be reasonable explanations given for the variances. Both Petitioner and Respondent Board have cited the court to this case.

Petitioner claims that the doctor-patient privilege. (905.04 Stats.) prevented him from testifying. Yet Kathy waived the privilege as is allowed at 905.11, Stats.. The unsuccessful effort by Kathy to withdraw the complaint (while not recanting the sexual contact charge) doesn't somehow boost the Petitioner into a box where he is required to remain silent under 905.04, Stats.. Also Petitioner's claim of moral adherence to the Hippocratic Oath

and confidentiality waivers some when he offers to testify/be examined *if* Kathy would be deposed by the State regarding his anatomy or *if* Kathy would testify first at the Hearing. The transparency of this position is seen even in Petitioner's appeal position that he was denied due process by not being allowed to testify. Inconsistent legal positions are taken situationally.

A claim is made that jurisdiction over Petitioner was not had due to certain statutes of limitation – 895.70 and 895.585, Stats. However, general subject statutes do not apply to the state without mandating language. *State ex rel Department of Public Instruction v. ILHR*, 68 Wis. 2d 677 (1975).

Costs are recoverable by the prevailing party under 227.485, 814.245 and 440.22, Stats..

Under Wisconsin's evidence rules it is possible to seek impeachment of a witness. This occurs every day in the courtrooms of Wisconsin. The general rule is found at 906.07, Stats.. Opinion evidence regarding a person's character for truthfulness or untruthfulness can come in under 906.08(1),Stats.. A different standard exists regarding impeachment by the use of specific instances of conduct. Generally, this evidence is not allowed. If it does come in under 906.08(2), Stats., it can't be remote in time and it must be directly probative of truthfulness. However, it is not possible to impeach a witness through the use of collateral data (even if it is true beyond a doubt).

This rule is important in limiting a proceeding to the established issues in the case. Our Supreme Court reversed a conviction in *State v. Sonnenberg*, 117 Wis. 2d 159 (1984), even though the defendant lied on the stand

and was impeached regarding the true facts. The lie, however, didn't relate to the crime charged. The rule is that collateral data may not be used to impeach. Much of this case, as I review it, is an attack on Kathy in areas having little or nothing to do with the charge – particularly extensive data regarding her mental illness. In the past in Wisconsin this type of approach was used to intimidate victims of sexual assaults in criminal cases. Specific laws were passed to insure that the criminal trial remained a search for the truth and not one that turns into an expose' regarding the victim. Concepts used by our Supreme Court in limiting such data include "unfair prejudice", "not established proposition of the case" and "collateral evidence can't be used to impeach."

In 1991, the Wisconsin Supreme Court issued a major decision in the area of collateral matters in *State v. Lindh,* 161 Wis. 2d 324 (1991). The Court said the following regarding collateral evidence at pages 358, 362 and 363:

> "We have long considered that on cross-examination into the character of a witness, use of irrelevancies, insinuating that a person is of bad moral character, tending to degrade him in the eyes of the jury, is not a proper impeachment device. Virtually by definition, such evidence is not relevant, tending only to prejudice the jury against the witness. The fact that Dr. Roberts may have engaged in professional misconduct and may have been subject to disciplinary measures as a result would not tend to make more or less likely the accuracy and correctness of his diagnosis and professional opinion in this case."

. . .

> Even if the proffered evidence could be considered marginally relevant to bias, motive or interest or to the character or credibility of Dr. Roberts as an expert, it was reasonable to conclude that the risk of unfair prejudice from admission of the evidence far outweighed the probative value of the evidence, and the cross-examination could have been properly prohibited for that reason."

. . .

> "The trial court may prohibit cross-examination in a certain area where to permit it would open up extraneous matters, for the trial court 'has responsibility for seeing that the sideshow does not take over the circus.' *U.S. v. Brown*, 547 F.2d 438 at 446 (8th Cir. 1977)"

Even the fact that Kathy apparently contradicted herself (3 sexual contacts versus 1 sexual contact, etc.), usually doesn't raise a 906.08(2), Stats., issue regarding her character for truthfulness. This was discussed in *State v. Anderson*, 163 Wis. 2d 342 at 348 *et al* (C.A.1991).

> "We emphasize that most contradictions in testimony will not raise the issue of witness's character for truthfulness. Many discrepancies may be explained by good faith error, differing vantage points from which an event is perceived or an honest difference in recollection. These are not the types of contradictions that place a witness's character in issue.

. . .

"Even when the contradiction between witnesses cannot otherwise be explained, the witness's character for truthfulness is not necessarily placed in issue. Anderson correctly observes that there is a difference between credibility and character for truthfulness."

. . .

"The mere fact that a witness if contradicted does not constitute an attack on the witness's character."

In *State v. Lindh,* examination of the doctor regarding professional misconduct was not allowed. It was collateral. Mentally ill persons go to see and be treated by psychiatrists. Do not the rules of collateralness also attach to mentally ill citizens in a proceeding which addresses a claim of professional misconduct against the patient by the doctor? In the context of 904.03, Stats., our Supreme Court has written strongly about the need to focus on the established proposition of the case. *Lease America Corporation v. Insurance Company of North America,* 88 Wis. 2d 395 at 401 (1979). Kathy was perhaps a wise woman in instinctively knowing and fearing the ordeal she would be exposed to if her complaint went forward.

The case was about Petitioner's innocence or guilt regarding specific conduct. Much of the record related to Kathy, totally apart from the 1 or 3 alleged sexual contacts. The Appellate Court may provide clarification in this area. In terms of this case, the court accepts the record as it is in its review.

DECISION

The Board in this case considered a substantial body of evidence. This included testimony of witnesses and consideration of many exhibits. The Decision it issued on 25 November 1994, was specific and detailed. So too was the Decision (on Rehearing) of 27 December 1994.

In reviewing the challenged Decisions this court looks to see whether it can discern the proper exercise of discretion. The language of the 25 November 1994 Decision refers to the statutory basis for jurisdiction, the definition of unprofessional conduct, the Code basis for a conclusion of conduct which is a danger to a patient, authority to access costs and notes restrictions regarding dispositional options.

The facts found are direct and to the point. Petitioner argues that the failure of the Board to discuss each of its contentions and theories indicates that the Board did not consider the entire record. Logic does not support the thesis. The Board did consider the entire record – in fairness, it discussed most of the points raised by Petitioner. Further, the Board is not required to write 100 page decisions. Not is it required to state its reasoning for what it does not find or conclude. What the Board must do is articulate its findings and conclusions and order in a manner such that its process of reasoning can be understood. All parts of a decision must be based on the record (including reasonable inferences) and applicable law.

This court concludes that the Board in its Decisions did evidence the appropriate use of discretion. Its action was not arbitrary as the Decisions have a rational basis.

The State's case was proved by a preponderance of the evidence as the Board concluded.

Petitioner disagrees with the Board because the Board found Kathy to be credible regarding her claim of sexual conduct at Dr. Saculla's home during one of three visits during the period 28 November 1989, and 25 December 1989. Yet, the Board heard Kathy testify, and be cross examined, regarding what had occurred. Dr. Saculla chose to remain silent. It was entirely proper to call Petitioner to testify in this civil case. Clearly the intended strategy was to impeach Kathy's credibility. This approach involves substantial risk. If, after all evidence is in, the Board accepts Kathy as credible and unimpeached on her claim, then no other significant rebuttal evidence is available for the Board to consider. If Petitioner had testified, the Board would have been required to weigh the credibility (See Wisconsin Jury Instructions-Civil #215) of both persons. Where the two versions are totally inconsistent, the Board ultimately must, under rules of law, decide which version of the facts represents the truth.

In any event, the hearing went forward with Petitioner challenging the credibility of Kathy in the following manner:

A. Claims of inconsistencies (some)

1. Visit of 5 March 1993, requesting complaint be dropped. Yet Kathy didn't recant her claim of sexual conduct with Petitioner.

2. Statement to Petitioner's investigator on 22 April 1993, saying she would be an

unreliable witness and her memory was uncertain. This was worded and prepared by employee of a party who had an interest in the outcome.

3. Statement of 14 May 1990, to Investigator Berndt while Kathy was a patient of MCMHC. It refers to 3 sexual contacts during the visits to the home of Petitioner. This data was reconfirmed by Inv. Berndt in June 1990, when she interviewed Kathy at her home. ALJ Rittel directly confronts this issue at page 21 of his decision.

4. Kathy's unequivocal testimony at the hearing that sexual contact with Petitioner occurred once and not three times.

5. Kathy's acceptance of a picture of a circumcised male as compatible with Petitioner. Yet Petitioner's penis was not circumcised at the time in question. Dr. Lakner noted the inconsistency in Kathy's testimony.

Each of these claimed inconsistencies was addressed by the ALJ and the Board. They did not, however, accept Petitioner's conclusions.

Each of these claimed inconsistencies was addressed by the ALJ and the Board. They did not, however, accept Petitioner's conclusions.

B. Claims of Irrational or Delusional Behavior (some)

1. During all 4 of her admissions to MCMHC.
2. Hospitalization at Waukesha Memorial in November 1989.
3. Disruptive behavior at work.
4. Fixation on a movie star.
5. Involuntary commitment.
6. Report from Investigator Robins regarding chaos in Kathy's life.
7. Ms. Plant's testimony of bizarre and sexually related activity by Kathy.
8. Ms. Durand's testimony about being stalked by Kathy months after the sexual contact.
9. Officer O'Neill's testimony about Kathy's threat to her mother in October 1989.
10. Officer Patrick's testimony about bizarre eating and numerous 911 calls from Kathy.
11. Officer Zuber's testimony about Kathy's conduct months and years after the incident at issue. He states Kathy made numerous false accusations.
12. Mr. Plant's testimony as a co-worker with Kathy noted her mental deterioration and had heard about sexually related accusations made by Kathy.

13. Mr. Neal testified that he was involved in Kathy's commitment in March 1990, and that Kathy had made sexual assault claims against him. This all occurred after the incident at issue.

14. Mr. Blair testified that he was a long time co-worker with Kathy. He described her as abnormal or aberrant and subject to sudden outbursts.

15. Mr. Lewinski testified also as a co-worker of Kathy. She had accused him of a sexual harassment.

16. It was asserted that Kathy also was sexually active with her long-term boyfriend during the time that the incident allegedly occurred with Dr. Saculla.

The Board considered all of this data (and more) that was in the record, and concluded that Kathy was a difficult person with whom to get along. However, she was not prone to make false accusations against others. Kathy was viewed, under the entire record of this case, as a reliable and truthful witness. Again, this conclusion is at odds with Petitioner's position. The ALJ and the Board considered the evidence of Petitioner, but rejected his conclusion.

C. Opinions of Experts (some)

1. Dr. Lakner, a psychiatrist, stated that Kathy was severely mentally ill and that caused her to be delusional and paranoid. He viewed her "description problems" with the anatomy of Petitioner to be indicative of delusional thinking.

2. Dr. Fredenthal, a psychologist, reviewed the entire record and concluded that Kathy's complaint was delusional. This opinion appears to cross the line of permissible comment allowed by an expert in Wisconsin (statement on ultimate issue, fact issue itself is beyond area of expertise and it is a comment on veracity of another witness).

3. In addition, both doctors stated that the treatment of Kathy by Petitioner was appropriate and met the required standard for care by a psychiatrist.

The ALJ and Board considered this portion of the record but disagreed with Petitioner. Kathy indeed had mental illness but, they concluded, she was stating facts and not fiction. Her condition didn't impede her ability to recall and testify truthfully – on direct and cross examination. The ability of the fact finder to evaluate the witness "under fire" is a critical component to the final determination it makes regarding credibility and weight. Facts the Board considered in opposition to the experts' conclusion of "appropriate care" of a patient included the sexual contact, visiting with Kathy at Petitioner's home on 3 occasions, violating MCMHC employment rules and the exchange of gifts between Petitioner and Kathy. Certainly the Board had to consider this expert testimony (and that of Dr. Cromwell and Dr. Factor) in accord with WJI-Civil 260. However, the fact finder is not bound by the opinion of any expert. The noted Jury Instruction also advises the fact finder regarding how to resolve differences of opinion by experts. The Board clearly performed its duty – it just didn't agree with Petitioner or his experts.

Petitioner's strategy, it appears, was to discredit Kathy as inconsistent, irrational and delusional through the testimony of medical personnel, friends, police, co-workers and neighbors. It was hoped that the psychiatrist and psychologist would establish both her mental illness and its delusional aspect.

The Board accepted and considered the evidence, but rejected the conclusion of "incredible."

The Decisions in this case are based on substantial evidence. A reasonable board, acting reasonably, could have reached the decision made in this case under the entire record created by the parties. The Board has special expertise in considering complaints of unprofessional conduct by licensed physicians. This court gives weight and recognition to that status. In this case that ALJ and Board went to great lengths to resolve and explain credibility and weight determinations. It found that Kathy, on the issue of one act of sexual contact in this case, was credible and believable. That Decision is not arbitrary. This court is obligated to search the record for evidence that supports the Decisions that was made. Substantial evidence does exist to support the overall Decision and particularly the credibility of Kathy on her claim of sexual contact with Petitioner.

The Board had a right to draw an adverse inference from Petitioner's refusal to testify in this matter. It could draw from that action an "inference on issues involving grounds for discipline." This is a direct reference to the language used by our Supreme Court in *State v. Postorino*, supra. It couldn't find professional misconduct based on any refusal to testify. Petitioner's claim of privilege is not

supported by the facts or the law. The Board acted correctly under the law. Kathy was a complainant against Petitioner. Her testimony corroborates that assertion. Even without this adverse inference, the record contains ample substantial evidence to support the decision reached.

Petitioner has not rebutted the presumption that exists in Wisconsin regarding the regularity of the Board's actions. Petitioner was afforded full due process – notice of charge, counsel, confrontation of witnesses, right to present his own witnesses, right to be present during hearing, right to testify or remain silent, the creation of a record for review, a written and detailed decision and the right to appeal. Petitioner didn't get the result he sought, but he did receive full due process.

Given the finding of one act of sexual contact with his patient, Kathy, the Board had a basis to conclude that Petitioner engaged in unprofessional conduct which tended to constitute a danger to his patient. Though it is not critical to this decision, the bizarre and irrational behavior of Kathy *after* the sexual conduct may, in part, be explained by her illness and the impact Petitioner's conduct had on her. That would be consistent with the Board's finding of dangerousness to the patient.

The Board's Decisions do reasonably explain the conflicts in Kathy's statements. Her testimony in the hearing is unwavering on the core assertion. The "describe his anatomy" issue is not persuasive. Petitioner's effort to "bargain" with the prosecutor on one occasion suggests deception more than fair play. Perhaps Kathy, as she testified as [sic] the hearing, wasn't attentive or focused

on remembering anatomy details during the sexual conduct. Such a position is inherently reasonable. The evidence on this issue by Petitioner is not probative as to Kathy's impeachment or to his innocence. The exact date of the circumcision isn't critical. What is important to the "deception" is that Petitioner was circumcised after the sexual contact with Kathy and before his proposal to have the State quiz Kathy. The fact of the proposal, and not the amount of time spent on it, is the predicate to the deception. Petitioner wasn't denied due process when the prosecutor wouldn't agree to his terms. Further bargaining occurred at the hearing when Petitioner agreed to "waive his objections" to testifying if Kathy would be called first to testify. Clearly a party has no right to control the manner of case presentation by his opponent.

This case was timely and reasonably prosecuted under applicable Wisconsin law. 448.02(3), Stats. and the entirety of Chapter 448.

The specific discipline imposed is within the jurisdiction and authority of the Board. It was significantly less severe than that recommended by the ALJ. The Board considered the unprofessional conduct of Petitioner to be very serious. That conclusion is well supported in the record. The unprofessional conduct was also dangerous to Kathy and her overall wellness.

This court is not empowered to address anew the issue of sanctions so long as those imposed are jurisdictionally valid and legally authorized. In this case the sanctions imposed by the Board are within its authority in all respects. The law (440.22, Stats.) and case decisions are clear that the prevailing party is entitled to costs and

fees from the losing party – here the Petitioner. The initial Statement of Costs for this case was submitted in mid December 1994. Petitioner is obligated to pay all costs reflected in the record and properly assessed and taxed under law.

ORDER

For the reasons above stated, it is ordered that the Decisions of the Board of 25 November 1994, and 27 December 1994, are affirmed in all respects.

Dated this 14 day of April, 1995.

BY ORDER OF THE COURT

/s/ Dennis J. Flynn
Dennis J. Flynn
Circuit Court Judge

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

LS9303102MED

FRANCOIS J. SACULLA, M.D.
Respondent

FINAL DECISION AND ORDER

The parties to this proceeding for the purposes of sec. 227.53, Stats, are:

Francois J. Saculla, M.D.
710 Melvin Avenue
Racine, WI 53402

State of Wisconsin
Medical Examining Board
P.O. Box 8935
1400 East Washington Avenue
Madison, WI 53708

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing in this matter was conducted on November 15-18, 1993; December 10 and 13, 1993; and, January 6 and 7, 1974. The respondent, Francois J. Saculla, M.D., appeared personally and by his attorney, Mary L.

Woehrer, Woehrer Law Office, 8145 West Wisconsin Avenue, Wauwatosa, Wisconsin 53213. The complainant appeared by attorney, John R. Zwieg, Department of Regulation and Licensing, Division of Enforcement, 1400 East Washington Avenue, Madison, Wisconsin 53708. A transcript of each day of the hearing was prepared and filed, the last of which was received on February 1, 1994. The administrative law judge filed his Proposed Decision on August 25, 1994. Attorney Woehrer filed her objections to the Proposed Decision on October 24, 1994. Attorney Zwieg filed his response on November 7, 1994. The parties appeared before the board on November 17, 1994, to present oral arguments on the objections, and the board considered the matter on that date. Based upon the entire record in this matter, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Francois J. Saculla, M.D., (D.O.B. 9/24/30), is licensed and registered to practice medicine and surgery in the state of Wisconsin, pursuant to license number 15925 which was granted on March 22, 1967.

2. Dr. Saculla's latest address on file with the Department of Regulation and Licensing is 710 Melvin Avenue, Racine, Wisconsin 53402.

3. Dr. Saculla's area of specialty is psychiatry.

4. Dr. Saculla was employed as a psychiatrist at the Milwaukee County Mental Health Center in Milwaukee, Wisconsin from March 1989 through January 15, 1990.

5. A 30 year old female patient, referred to herein as "Kathy", was admitted to the Milwaukee County Mental Health Center on October 14, 1989 for psychiatric problems. Kathy was under the professional care of Dr. Saculla during her hospitalization. Kathy was discharged from that hospitalization on November 3, 1989.

6. On November 20, 1989, Kathy was readmitted to the Milwaukee County Mental Health Center and discharged from that inpatient psychiatric hospitalization on November 28, 1989. During that hospitalization she was under the professional care of Dr. Saculla.

7. The discharge note of November 28, 1989, written by Dr. Saculla, indicates that the continuing care plan was to follow Kathy in the outpatient mental health clinic and that her next appointment was scheduled for December 5, 1989.

8. On December 5, 1989, Dr. Saculla, in his professional capacity, saw Kathy on an outpatient basis at Milwaukee County Mental Health Center. Dr. Saculla's note of that date indicates that his plan was to continue to follow Kathy on an outpatient basis.

9. Between Kathy's inpatient discharge of November 28, 1989 and Christmas of 1989, Kathy met with Dr. Saculla at his home in Racine, Wisconsin on at least three occasions. On one of those occasions, Dr. Saculla and Kathy engaged in sexual conduct in which Kathy performed oral sex on Dr. Saculla.

10. On January 3, 1990, Dr. Saculla, in his professional capacity, saw Kathy on an outpatient basis at Milwaukee County Mental Health Center. Dr. Saculla's note

of that date indicates that his plan was for the patient to return for another appointment in a month or as needed.

11. A psychiatrist who engages in sexual conduct with a psychiatric patient exposes the patient to unreasonable risk of harm.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this proceeding pursuant to ch. 448, Stats.

2. Because it exposes the patient to unreasonable risk of harm, it is below the minimal standards of the psychiatric profession for a psychiatrist to engage in sexual conduct with a psychiatric patient.

3. The act of Francois J. Saculla, M.D., in engaging in sexual conduct with his patient Kathy, constitutes unprofessional conduct as defined in sec. 448.02(3), Stats., and sec. Med 10.02(2)(h), by tending to constitute a danger to a patient.

ORDER

NOW, THEREFORE IT IS ORDERED that the license to practice medicine and surgery of Francois J. Saculla, M.D., be, and hereby is, limited to impose the following terms and conditions:

1. Respondent's practice shall not include the treatment of females of any age

2. Respondent's entire practice of medicine and surgery in Wisconsin shall be under the direct on-premises

supervision of another physician satisfactory to the board.

3. Respondent shall be responsible for submission to the board of formal written quarterly reports prepared by his practice supervisor setting forth respondent's activities and progress in his practice of medicine, and evaluating his continuing ability to competently and safely practice medicine and surgery.

4. Respondent shall, within 90 days of the date of this order, arrange for a psychological evaluation relating to the issues raised by the board's Findings of Fact in this matter, to be conducted by John C. Gonsiorek, Ph.D., Minneapolis, Minnesota or, if Dr. Gonsiorek is unavailable, by another psychiatrist or psychologist, approved in advance by the board, who has assessed and treated health care professionals found to have engaged in sexual contact with patients. Dr. Gonsiorek's evaluation shall include recommendations for additional limitations to be placed upon respondent's practice of medicine and surgery, including recommendations relating to psychotherapy, and respondent shall submit to whatever such recommended terms, conditions or limitations as may be adopted by the board.

5. If as a result of Dr. Gonsiorek's recommendation, the board orders that respondent participate in a program of psychotherapy with a psychiatrist or psychologist approved in advance by the board, respondent shall be responsible for submission to the board of quarterly formal written reports from his treating psychiatrist or psychologist setting forth respondent's progress in treatment

and evaluating his continuing ability to safely practice medicine and surgery.

6. Respondent shall provide and keep on file with all treating health care professionals and facilities current releases which comply with all applicable state and federal laws authorizing release of all his medical and treatment records and reports to the Medical Examining Board and which permit his treating health care professionals to disclose the progress of his treatment and rehabilitation with the Medical Examining Board and its agents. Copies of said releases shall be filed simultaneously with the Medical Examining Board.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon the respondent, Francois J. Saculla, M.D., pursuant to sec. 440.22, Stats.

EXPLANATION OF VARIANCE

The board has adopted the proposed Findings of Fact and Conclusions of law of the administrative law judge in their entirety. The board has not adopted that part of the proposed Order recommending revocation of Dr. Saculla's license, and instead orders that his license be limited.

Sec. 15.08(4), Stats., states as follows:

> (4) QUORUM, (a) A majority of the membership of an examining board constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the examining board.

> (b) Notwithstanding par. (a), no certificate or license which entitles the person certified or licensed to practice a trade or profession shall be suspended or revoked without the affirmative vote of two-thirds of the membership of the examining board.

Two-thirds of the voting members of the board present at the time this matter was considered voted to accept the recommended Order of the Administrative Law Judge revoking the license. That number did not, however, constitute two-thirds of the board's entire membership. Consequently, the board set about the task of fashioning a lesser discipline which nonetheless fulfills the accepted disciplinary objectives of protecting the public, deterring other licensees from engaging in similar misconduct, and promoting the rehabilitation of this respondent.

In terms of immediate protection of the public, the order prohibits respondent from treating female patients of any age, and requires that his entire practice be under the direct on-premises supervision of another physician satisfactory to the board. The board's past experience is that these limitations have been successful in ensuring that inappropriate physician-patient contact does not occur. Additionally, the order requires that respondent promptly submit to a psychological evaluation by Dr. John C. Gonsiorek, a recognized authority in the area of assessment and treatment of health care professionals who have exceeded acceptable boundaries in their relationships with patients. Should Dr. Gonsiorek recommend that additional limitations on respondent's practice be imposed, the Order permits the board to adopt those

recommendations in the interest of further ensuring the public's safety.

The requirement that respondent submit to a psychological evaluation is also designed to subserve the rehabilitation objective, by permitting the board to require that respondent submit to psychotherapy if recommended by Dr. Gonsiorek. Again, the board's experience has been that psychotherapy is effective in dealing with boundary issues.

Finally, it is the board's opinion that limitations, no matter how rigorous, are probably not as effective as revocation in terms of deterring other licensees. Nonetheless, the conditions imposed by this order are sufficiently rigorous to notify other licensees of the board of the seriousness with which the board views the misconduct found in this case.

Dated this 25 day of Nov., 1994.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by /s/ Clark O. Olsen, M.D.
Clark O. Olsen, M.D.
Secretary

Wisconsin 1993-94 Statutes
905.04 Physician-patient, registered nurse-patient, chiropractor-patient,

905.04 Physician-patient, registered nurse-patient, chiropractor-patient, psychologist-patient, social worker-patient, marriage and family [SEE 1995 WISCONSIN ACT 77]

(1) DEFINITIONS. In this section:

(a) "Chiropractor" means a person licensed under s. 446.02, or a person reasonably believed by the patient to be a chiropractor.

(b) A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient's family.

(bm) "Marriage and family therapist" means an individual who is certified as a marriage and family therapist under ch. 457 or an individual reasonably believed by the patient to be a marriage and family therapist.

(c) "Patient" means an individual, couple, family or group of individuals who consults with or is examined or

interviewed by a physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(d) "Physician" means a person as defined in s. 990.01 (28), or reasonably believed by the patient so to be.

(dm) "Professional counselor" means an individual who is certified as a professional counselor under ch. 457 or an individual reasonably believed by the patient to be a professional counselor.

(e) "Psychologist" means a licensed psychologist, as that term is defined in s. 455.01 (4), or a person reasonably believed by the patient to be a psychologist.

(f) "Registered nurse" means a nurse who is licensed under s. 441.06 or a person reasonably believed by the patient to be a registered nurse.

(g) "Social worker" means an individual who is certified as a social worker under ch. 457 or an individual reasonably believed by the patient to be a social worker.

(2) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons,

including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. (a) Proceedings for hospitalization, guardianship, protective services or protective placement. There is no privilege under this rule as to communications and information relevant to an issue in proceedings to hospitalize the patient for mental illness, to appoint a guardian under s. 880.33, for court-ordered protective services or protective placement or for review of guardianship, protective services or protective placement orders, if the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor in the course of diagnosis or treatment has determined that the patient is in need of hospitalization, guardianship, protective services or protective placement.

(am) Proceedings for guardianship. There is no privilege under this rule as to information contained in a statement concerning the mental condition of the patient

furnished to the court by a physician or psychologist under s. 880.33 (1).

(b) Examination by order of judge. If the judge orders an examination of the physical, mental or emotional condition of the patient, or evaluation of the patient for purposes of guardianship, protective services or protective placement, communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) Condition an element of claim or defense. There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(d) Homicide trials. There is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide.

(e) Abused or neglected child. 1. In this paragraph:

a. "Abuse" has the meaning given in s. 48.981 (1) (a).

b. "Neglect" has the meaning given in s. 48.981 (1) (d).

2. There is no privilege in situations where the examination of an abused or neglected child creates a

reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the abuse or neglect was other than accidentally caused or inflicted by another.

(f) Tests for intoxication. There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or blood alcohol concentration.

(g) Paternity proceedings. There is no privilege concerning testimony about the medical circumstances of a pregnancy or the condition and characteristics of a child in a proceeding to determine the paternity of that child under ss. 767.45 to 767.53.

(h) Reporting wounds and burn injuries. There is no privilege regarding information contained in a report under s. 146.995 pertaining to a patient's name and type of wound or burn injury.

(i) Providing services to court in juvenile matters. There is no privilege regarding information obtained by an intake worker or dispositional staff in the provision of services under s. 48.067 or 48.069. An intake worker or dispositional staff member may disclose information obtained while providing services under s. 48.067 or 48.069 only as provided in s. 48.78.

Wisconsin 1993-94 Statutes

940.22 Sexual exploitation by therapist; duty to report.

940.22 Sexual exploitation by therapist; duty to report.

(1) DEFINITIONS. In this section:

(a) "Department" means the department of regulation and licensing.

(b) "Physician" has the meaning designated in s. 448.01 (5).

(c) "Psychologist" means a person who practices psychology, as described in s. 455.01 (5).

(d) "Psychotherapy" has the meaning designated in s. 455.01 (6).

(e) "Record" means any document relating to the investigation, assessment and disposition of a report under this section.

(f) "Reporter" means a therapist who reports suspected sexual conduct between his or her patient or client and another therapist.

(g) "Sexual contact" has the meaning designated in s. 940.225 (5) (b).

(h) "Subject" means the therapist named in a report or record as being suspected of having sexual contact with a patient or client or who has been determined to have engaged in sexual contact with a patient or client.

(i) "Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed

or certified by the state, who performs or purports to perform psychotherapy.

(2) SEXUAL CONTACT PROHIBITED. Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class D felony. Consent is not an issue in an action under this subsection.

(3) REPORTS OF SEXUAL CONTACT. (a) If a therapist has reasonable cause to suspect that a patient or client he or she has seen in the course of professional duties is a victim of sexual contact by another therapist or a person who holds himself or herself out to be a therapist in violation of sub. (2), as soon thereafter as practicable the therapist shall ask the patient or client if he or she wants the therapist to make a report under this subsection. The therapist shall explain that the report need not identify the patient or client as the victim. If the patient or client wants the therapist to make the report, the patient or client shall provide the therapist with a written consent to the report and shall specify whether the patient's or client's identity will be included in the report.

(b) Within 30 days after a patient or client consents under par. (a) to a report, the therapist shall report the suspicion to:

1. The department, if the reporter believes the subject of the report is licensed by the state. The department shall promptly communicate the information to the

appropriate examining board or affiliated credentialing board.

2. The district attorney for the county in which the sexual contact is likely, in the opinion of the reporter, to have occurred, if subd. 1. is not applicable.

(c) A report under this subsection shall contain only information that is necessary to identify the reporter and subject and to express the suspicion that sexual contact has occurred in violation of sub. (2). The report shall not contain information as to the identity of the alleged victim of sexual contact unless the patient or client requests under par. (a) that this information be included.

(d) Whoever intentionally violates this subsection by failing to report as required under pars. (a) to (c) is guilty of a Class A misdemeanor.

(4) CONFIDENTIALITY OF REPORTS AND RECORDS. (a) All reports and records made from reports under sub. (3) and maintained by the department, examining boards, affiliated credentialing boards, district attorneys and other persons, officials and institutions shall be confidential and are exempt from disclosure under s. 19.35 (1). Information regarding the identity of a victim or alleged victim of sexual contact by a therapist shall not be disclosed by a reporter or by persons who have received or have access to a report or record unless disclosure is consented to in writing by the victim or alleged victim. The report of information under sub. (3) and the disclosure of a report or record under this subsection does not violate any person's responsibility for maintaining the confidentiality of patient health care records, as defined in s. 146.81 (4) and as required under s. 146.82.

Reports and records may be disclosed only to appropriate staff of a district attorney or a law enforcement agency within this state for purposes of investigation or prosecution.

(b) 1. The department, a district attorney, an examining board or an affiliated credentialing board within this state may exchange information from a report or record on the same subject.

2. If the department receives 2 or more reports under sub. (3) regarding the same subject, the department shall communicate information from the reports to the appropriate district attorneys and may inform the applicable reporters that another report has been received regarding the same subject.

3. If a district attorney receives 2 or more reports under sub. (3) regarding the same subject, the district attorney may inform the applicable reporters that another report has been received regarding the same subject.

4. After reporters receive the information under subd. 2. or 3., they may inform the applicable patients or clients that another report was received regarding the same subject.

(c) A person to whom a report or record is disclosed under this subsection may not further disclose it, except to the persons and for the purposes specified in this section.

(d) Whoever intentionally violates this subsection, or permits or encourages the unauthorized dissemination or use of information contained in reports and records

made under this section, is guilty of a Class A misdemeanor.

(5) IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report or record under this section is immune from any civil or criminal liability that results by reason of the action. For the purpose of any civil or criminal action or proceeding, any person reporting under this section is presumed to be acting in good faith. The immunity provided under this subsection does not apply to liability resulting from sexual contact by a therapist with a patient or client.

Wisconsin 1993-94 Statutes
939.74 Time limitations on prosecutions.

939.74 Time limitations on prosecutions.

(1) Except as provided in sub. (2), and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

(2) Notwithstanding that the time limitation under sub. (1) has expired:

(a) A prosecution under s. 940.01, 940.02 or 940.03 may be commenced at any time.

(b) A prosecution for theft against one who obtained possession of the property lawfully and subsequently misappropriated it may be commenced within one year after discovery of the loss by the aggrieved party, but in no case shall this provision extend the time limitation in sub. (1) by more than 5 years.

(c) A prosecution for violation of s. 948.02, 948.03, 948.04, 948.05, 948.06, 948.07 or 948.08 shall be commenced before the victim reaches the age of 26 years, or be barred.

(d) A prosecution for violation of s. 948.025 may be commenced within the time period specified in sub. (1) or by the time the victim reaches the age of 25 years, whichever is later.

(3) In computing the time limited by this section, the time during which the actor was not publicly a resident within this state or during which a prosecution against the actor for the same act was pending shall not be included. A prosecution is pending when a warrant or a summons has been issued, an indictment has been found, or an information has been filed.

(4) In computing the time limited by this section, the time during which an alleged victim under s. 940.22 (2) is unable to seek the issuance of a complaint under s. 968.02 due to the effects of the sexual contact or due to any threats, instructions or statements from the therapist shall not be included.

Wisconsin 1993-94 Statutes
15.08 Examining boards and councils.

15.08 Examining boards and councils.

(1) SELECTION OF MEMBERS. All members of examining boards shall be residents of this state and shall, unless otherwise provided by law, be nominated by the governor, and with the advice and consent of the senate appointed. Appointments shall be for the terms provided by law. Terms shall expire on July 1. No member may serve more than 2 consecutive terms. No member of an examining board may be an officer, director or employe [sic] of a private organization which promotes or furthers the profession or occupation regulated by that board.

(1m) PUBLIC MEMBERS. (a) Public members appointed under s. 15.405 or 15.407 shall have all the powers and duties of other members except they shall not prepare questions for or grade any licensing examinations.

(am) Public members appointed under s. 15.405 or 15.407 shall not be, nor ever have been, licensed, certified, registered or engaged in any profession or occupation licensed or otherwise regulated by the board, examining board or examining council to which they are appointed, shall not be married to any person so licensed, certified, registered or engaged, and shall not employ, be employed by or be professionally associated with any person so licensed, certified, registered or engaged.

(b) The public members of the chiropractic examining board, the dentistry examining board, the hearing and speech examining board, the medical examining board, podiatry examining council, occupational therapy

examining council, respiratory care practitioners examining council and council on physician assistants, the board of nursing, the nursing home administrator examining board, the veterinary examining board, the optometry examining board, the pharmacy examining board, the examining board of social workers, marriage and family therapists and professional counselors and the psychology examining board shall not be engaged in any profession or occupation concerned with the delivery of physical or mental health care.

(c) The membership of each examining board and examining council created in the department of regulation and licensing after June 1, 1975, shall be increased by one member who shall be a public member appointed to serve for the same term served by the other members of such examining board or examining council, unless the act relating to the creation of such examining board or examining council provides that 2 or more public members shall be appointed to such examining board or examining council.

(2) SELECTION OF OFFICERS. At its first meeting in each year, every examining board shall elect from among its members a chairperson, vice chairperson and, unless otherwise provided by law, a secretary. Any officer may be reelected to succeed himself or herself.

(3) FREQUENCY OF MEETINGS. (a) Every examining board shall meet annually and may meet at other times on the call of the chairperson or of a majority of its members.

(b) The medical examining board shall meet at least 12 times annually.

(c) The hearing and speech examining board shall meet at least once every 3 months.

(4) QUORUM. (a) A majority of the membership of an examining board constitutes a quorum to do business, and a majority of a quorum may act in any matter within the jurisdiction of the examining board.

(b) Notwithstanding par. (a), no certificate or license which entitles the person certified or licensed to practice a trade or profession shall be suspended or revoked without the affirmative vote of two-thirds of the membership of the examining board.

(5) GENERAL POWERS. Each examining board:

(a) May compel the attendance of witnesses, administer oaths, take testimony and receive proof concerning all matters within its jurisdiction.

(b) Shall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.

(c) May limit, suspend or revoke, or reprimand the holder of, any license, permit or certificate granted by the examining board.

(6) IMPROVEMENT OF THE PROFESSION. In addition to any other duties vested in it by law, each examining board shall foster the standards of education or training pertaining to its own trade or profession, not only in relation of the trade or profession to the interest of the individual or to organized business enterprise, but also in relation to government and to the general welfare.

Each examining board shall endeavor, both within and outside its own trade or profession, to bring about a better understanding of the relationship of the particular trade or profession to the general welfare of this state.

(7) COMPENSATION AND REIMBURSEMENT FOR EXPENSES. Each member of an examining board shall, unless the number is a full-time salaried employe [sic] of this state, be paid a per diem of $25 for each day on which the member was actually and necessarily engaged in the performance of examining board duties. Each member of an examining board shall be reimbursed for the actual and necessary expenses incurred in the performance of examining board duties.

(8) OFFICIAL OATH. Every member of an examining board shall take and file the official oath prior to assuming office.

(9) ANNUAL REPORTS. Every examining board shall submit to the head of the department in which it is created, upon request of that person not more often than annually, a report on the operation of the examining board.

(10) SEAL. Every examining board may adopt a seal.